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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 325

COLUMBIA PROPERTIES, INC.,

Appellant,

vs.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

STATEMENT OF STATE BOARD OF TAX COMMISSIONERS OF INDIANA OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL.

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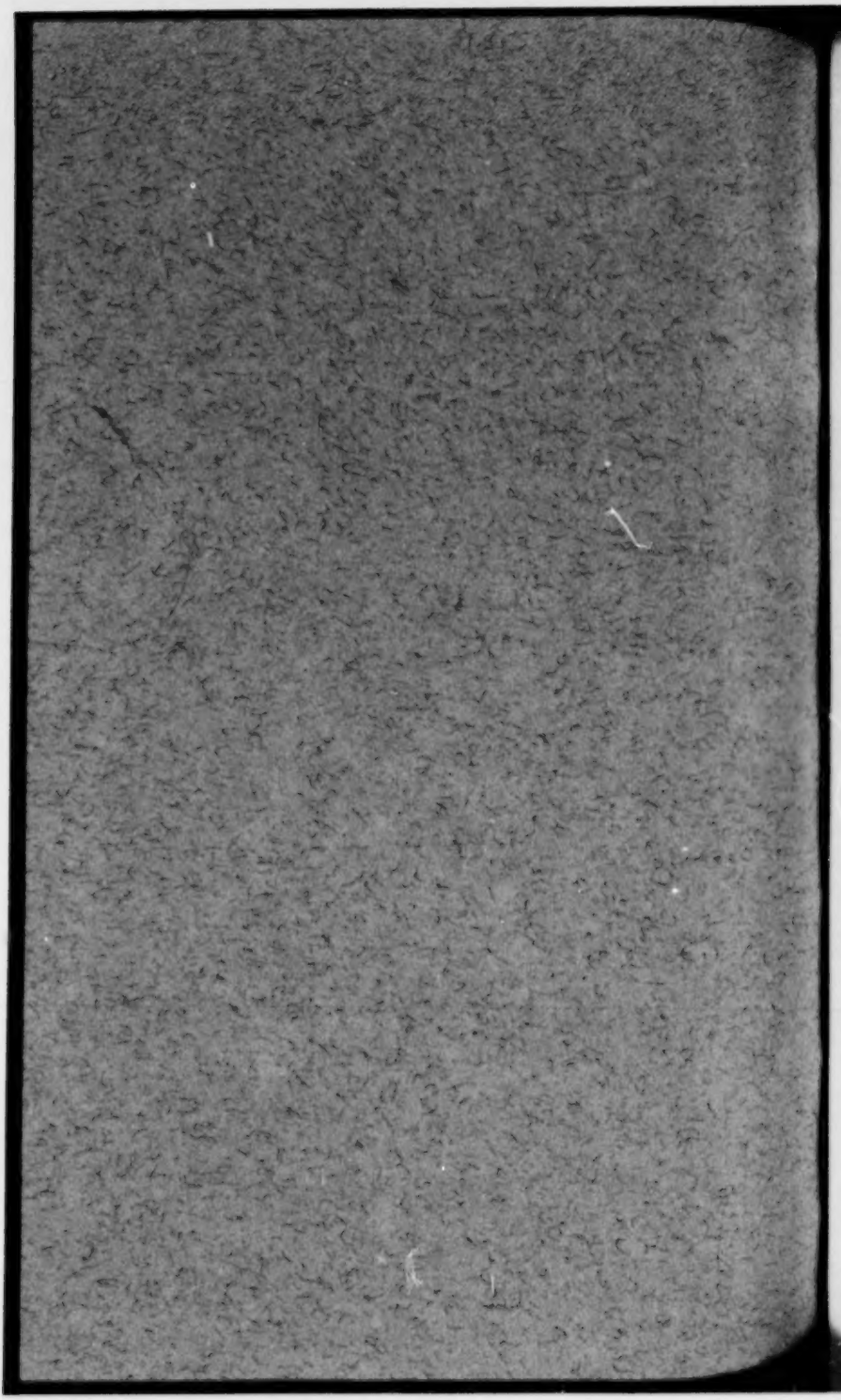
Counsel for Appellee.



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SUPREME COURT OF THE UNITED STATES

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STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, NOBLE W. HOLLAR, FRANK G. THOMPSON, AND ADOLPH L. FOSSLER, MEMBERS OF THE STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA, OSCAR H. SCHMIDT, OTTO H. MEYER, EDWARD L. GOEBEL, JAMES R. DUNCAN, AND CHARLES GRISSOM, MEMBERS OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA; OSCAR H. SCHMIDT, COUNTY ASSESSOR OF VANDERBURGH COUNTY, STATE OF INDIANA; MARTIN FULLING, TOWNSHIP ASSESSOR OF KNIGHT TOWNSHIP, VANDERBURGH COUNTY, STATE OF INDIANA, OTTO H. MEYER, COUNTY AUDITOR OF VANDERBURGH COUNTY, STATE OF INDIANA; EDWARD L. GOEBEL, COUNTY TREASURER OF VANDERBURGH COUNTY, STATE OF INDIANA, ROBERT C. KOLLKER, COUNTY ASSESSOR OF VANDERBURGH COUNTY, STATE OF INDIANA, JOHN A. ELLERT, COUNTY AUDITOR OF VANDERBURGH COUNTY, STATE OF INDIANA, ROBERT G. KOLLKER, JOHN A. ELLERT, AND JOHN J. BOINK, MEMBERS OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE

OF INDIANA, CLYDE OVIATT, COUNTY TREASURER OF VANDERBURGH COUNTY, STATE OF INDIANA, CLYDE OVIATT, MEMBER OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,

Appellees

STATEMENT OF MATTERS MAKING AGAINST JURISDICTION

This appeal is based on 28 U.S.C., Sec. 1257, which provides for appeals from final judgments rendered by the highest court of a state in which a decision can be had:

> "• • • where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. • • •"

The Appellee, State Board of Tax Commissioners of the State of Indiana, would respectfully show the court as follows:

(1) The validity of a state statute was not drawn into question herein.

(2) The decision herein was not in favor of the validity of a state statute.

I

Validity of State Statute Not Drawn in Question

There is no allegation in Appellant's Amended Petition In Appeal and Amended Complaint that any state statute is, by its terms, invalid. (Tr., pp. 79-98). The Amended Petition In Appeal and Amended Complaint also appears in "Appendix B" to Appellant's Statement as to Jurisdiction.

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Rather, the complaint attacks a *determination of fact* and a *tax assessment* made by taxing authorities acting under a reassessment statute, Ch. 225 of the Acts of 1949; *Burns' Ind. Stat. Ann.* (1951 Repl.) Sec. 64-1019 n. The determination complained of is that the tax assessment officials have graded certain improvements on appellant's property as "Average" rather than "Low Cost".

We believe this is analagous to the situation before this Court in *Charleston Assn.* v. *Alderson,* 324 U. S. 182 (1944) where the complaint alleged only that certain assessments were not uniform and equal with the assessments of other property owners and they violated the Fourteenth Amendment. In dismissing the appeal the Court said, at p. 185:

> "It is essential to our jurisdiction on appeal under Sec. 237 (a) that there be an *explicit* and timely insistence in the state court that a state statute, *as applied,* is repugnant to the federal Constitution, treaties or laws. • • • And it has long been settled that an attack upon a tax assessment or *levy* . . . on the ground that it infringes a taxpayers federal rights, privileges or immunities will not sustain an appeal under Sec. 237 (a)." (Our emphasis.)

Validity of State Statute as Applied Not Drawn Into Question

In order to sustain a direct appeal to this Court the Appellant asserts that both the Vanderburgh Circuit Court and the Supreme Court of Indiana have, in sustaining a demurrer to its Complaint, and in affirming the judgment rendered thereon, necessarily construed a state statute, Ch. 91 of the Acts of 1927; *Burns' Ind. Stat Ann.* (1951 Repl.) Sec. 64-1020, and applied it to the appellant in a manner violative of its federal rights.

But the validity of this statute was not drawn into question below as is shown by the following points of substan-

tive and procedural law which necessitated the rulings herein.

The Question Before The Supreme Court of Indiana

Appellees herein filed a Demurrer (Tr., p. 110) to Appellant's Amended Petition in Appeal and Amended Complaint on the ground that said pleading did not state facts sufficient to state a cause of action. The Demurrer was sustained (Tr., p. 126).

Appellant refused to further amend its complaint (Tr., p. 127) or to plead over and state the real facts of its action. This was its *absolute right* under the law of Indiana. *Royal Ins. Co.* v. *Stewart* (1920) 190 Ind. 444, 455, 129 N. E. 853.

Judgment was thereupon rendered against Appellant, which judgment was appealed to the Supreme Court of Indiana. On appeal the only assignment of error presenting a question to the Supreme Court of Indiana was that, "The Court erred in sustaining the Demurrer (of the Appellees) to Appellant's Amended Petition in Appeal and Amended Complaint," (Tr., p. 4).

Was Appellant Entitled to Judicial Review?

Under Section 1, Article 3 of the Constitution of Indiana:

> "The powers of the Government are divided into three separate departments; the Legislative, the Executive, including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

It has long been held that, "The powers of the three departments are not merely equal—they are *exclusive* in respect to the duties assigned to each." *Wright* v. *Defrees and Others* (1856) 8 Ind. 298, 302.

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It is equally well established that, "The taxing power is a legislative function, and the fixing of levies, the assessment of property and collection of taxes is generally considered and spoken of as administrative action which is an incident of the legislative power." *Peden et al* v. *Board of Review of Cass County* (1934) 208 Ind. 215, 220, 195 N.E. 87. And the decision of the State Board of Tax Commissioners in making assessments within the scope of their authority is final, except under circumstances where relief may be granted by the courts. *Fesler, Auditor* v. *Bosson* (1920, 189 Ind. 484, 493, 128 N.E. 145. Because of this separation of powers, a court may grant relief only when a *judicial question* is presented to it:

> "Relief may be had if fraud is shown on the part of any of the parties in fixing the value; if it is shown that it was not honestly appraised, but the value was fixed arbitrarily, and capriciously, and not in proportion to other property of like character and situation. If the law, under which the taxing authorities were operating was invalid and unconstitutional, the party complaining would have the right to appeal to the courts for relief, and other instances might be mentioned. All of the above illustrations would call for *judicial action*, and could be brought before the courts in a proper proceeding, although there has been no statute authorizing an appeal."
>
> *Peden* v. *Board of Review of Cass County* (1934), 208 Ind. 215, 223, 195 N.E. 87.

The reason for this fundamental requirement that a *judicial question* be presented in order to enable a Court to review a determination made by taxing officials was stated by this Court when it said:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial.

> This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, *to preclude a comingling of these essentially different powers of government in the same hands.* (Our emphasis.)
>
> *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933).

Therefore, Appellees' Demurrer raised only one question before the Courts below: Does the complaint state facts presenting a *judicial question?*

II

Decision Not in Favor of Validity of State Statute

The Complaint

The gravamen of the complaint is that the tax assessing officials have arbitrarily and unlawfully discriminated against Appellant in grading improvements on its property as "Average" rather than "Low Cost" in a manner violative of its federal rights. The pertinent allegations thereof may be summarized as follows:

Paragraph 7 contains recitals as to various appeals to, and appearances by Appellant before the Vanderburgh County Board of Review and the State Board of Tax Commissioners, in the course of which Appellant's per unit assessment was reduced from $10,930.00 to $8,700.00 (Tr., p. 84).

Paragraph 8 alleges that the determination complained of is unlawful, arbitrary, and in violation of federal rights because:

> (a) The improvements on appellant's property are constructed of materials, and by methods defined as "Low Cost" in the Indiana Real Estate Assessment

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Guide No. 1 under which Appellees acted in assessing Appellant's property.

(b) There are only two other properties comparable to Appellant's property in Vanderburgh County, Indiana, identical in size and similar in design. One is graded as "Low Cost" and assessed at $6,970.00 per unit; the other is graded "Average" and assessed at per unit values varying from $7,190.00 to $7,440.00 (Tr., p. 89).

There is no allegation here that there was any fraud involved or that there was an intentional or purposeful discrimination against Appellant. Rather by these allegations Appellant seeks to question the correctness of the judgment of the tax assessing officials.

But the equal protection clause does not prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 190 (1944), and allegations concerning honest mistake or error in judgment do not present a judicial question, since:

> "The court having no power to review the proceedings, the action of the State board being final, no right of action existed to set it aside except for *fraud*, and, it not being attacked on that ground, no evidence was admissible; for it is a well settled rule that the *courts have no power to give any relief against erroneous assessments of such boards*, except they are given such power by statute, and no such power is given in this state." (Our emphasis.)
>
> *Pittsburg, C., C. & St. L. Ry. Co.* v. *Backus, Treasurer* (1892) 133 Ind. 625, 653, 33 N.E. 432; Affirmed 154 U. S. 421 (1893).

Paragraph 9 of the Complaint alleges that the assessing officials made the determinations complained of:

> (a) on the sole basis of evidence presented by appellant, which evidence could not reasonably sustain such a determination, or
>
> (b) on the basis of evidence presented by persons whom appellant had no opportunity to confront or cross examine and appellant was thereby deprived of a full hearing as required by law and in violation of its federal rights (Tr., p. 92).

These allegations do not present a judicial question nor a violation of federal rights.

In (a) above, appellant's major premise again rests upon the possibility of honest mistake or error in judgment of the tax assessing officials. Fraud is not alleged; nor is intentional discrimination.

In (b) Appellant asserts the right to a full hearing in which it can cross examine tax assessment officials and rebut their testimony. However, Appellant does not allege that it attempted to call the tax assessing officials as witness at any administrative hearing or that any such persons were not allowed to testify at such a hearing. Tax assessing officials cannot be compelled to submit to examination as to the operation of their minds in making the challenged assessment. *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 145 (1935). *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 593 (1906).

This principle is particularly applicable here where, under the law, the State Board of Tax Commissioners was required, after Appellant's appeal to it, to assess the property in controversy. See, Sec. 189 of Ch. 59 of the Acts of 1919, as amended; Burns' Ind. Stat. Ann. (1951 Repl.) Sec. 64-1321. The denial of Appellant's right to a full hearing under Burns' Ind. Stat. Ann. Sec. 64-1020 providing for

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judicial review of administrative boards authorized to fix the value of property for taxes, presupposes that appellant has presented a judicial question to the Court. This, as heretofore pointed out, has not been done.

Paragraph 10 alleges that the assessment complained of was arbitrary and void because:

> (a) The Appellees violated the assessment law and the rules and regulations made thereunder.
>
> (b) the appellees arbitrarily graded appellant's property as "average" and arbitrarily refused to change same.
>
> (c) the assessment is too excessive and so far in excess of similar properties as to compel the conclusion that the assessment was made in disregard of the law and resulted from an intentional and purposeful discrimination against Appellant in violation of its federal rights.
>
> (d) the Appellees who did not actively commit any wrongful act in making said determination acted wrongfully in failing to relieve Appellant of such wrongful acts (Tr., p. 93).

No judicial question is stated here. It is fundamental that the wrongful administration of a statute involving intentional and purposeful discrimination would amount to a denial of due process and equal protection. *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1943).

But it is equally true that *overvaluation* is *not of itself sufficient* to warrant injunction against any part of the taxes based on the challenged assessment; mere error of judgment is not enough:

> "* * * there must be something that in legal effect is the equivalent of intentional or fraudulent purpose to overvalue the property * * *"
>
> *Great Northern Ry. Co.* v. *Weeks*, 297 U. S. 135, 139 (1935);

Rowley v. *Chicago & N. W. Ry.* 293 U. S. 102, 111 (1934).

Paragraph 10 (c) above contains the only allegations in the complaint which could possibly be construed as alleging an intentional discrimination.

But the facts supporting this conclusion of law are that Appellant's property is graded as "Average" rather than "Low Cost". The appellant has seized upon one incident in the evaluation process and attempted to restrict the judgment of the taxing officials in a manner and to an extent that it is not restricted by the law upon which the Appellant relies.

Page 44 of the Indiana Real Estate Assessment Guide No. 1, which was adopted pursuant to Ch. 225 of the Acts of the Indiana General Assembly of 1949, see Exhibit A to Appellant's Amended Petition in Appeal and Amended Complaint, (Tr., p. 99) contains the following language:

> "• • • the grade will be determined by observation. *Low cost* grade would apply to residences built with little or no regard to building codes, of substandard materials and workmanship. *Average* grade would apply to residences built from good architectural plans by competent contractors with better than average material used throughout. *Good* grade would be residences built from good architectural plans with the best grade of materials used throughout. • • •"

Appellant relies upon these regulations concerning the grading of property to impute, and show by circumstance, that the Appellees have intentionally discriminated against it.

But the grading of property under these regulations is clearly a phase of the assessment procedure involving matters of judgment and opinion.

. . *Better than average materials* and *Good architectural*

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plans are not defined by law, nor is *Competent contractors* or *Substandard workmanship.*

Appellant's complaint is heavy with conclusions of law such as "arbitrary" and "capricious" but *facts* are nowhere stated in support of these conclusions. Appellant does not allege fraud or intentional discrimination but asks the court to presume that it exists since Appellant's judgment differs from that of the Appellees as to what is "Average" and what is "Low Cost" property. This is not a judicial question.

The Supreme Court of Indiana considered the Complaint stripped of all conclusions of law and properly refused to assume the functions of the tax assessing officials.

Improper Assignments of Error

Appellant also assigned as error that:

> 5. "The court erred in rendering judgment against the Appellant without trial as required by the Acts of the Indiana General Assembly (1927), Chapter 91, Sec. 2, p. 233 (Burns' Ind. Statutes, Annotated, 1951 Replacement, Sec. 64-1020). (Tr., p. 5.)

This is not sufficient to present a question to the Supreme Court of Indiana since the error of the lower court, if any, was in sustaining the Demurrer, and judgment follows such action as a matter of course where the plaintiff refuses to exercise his right to plead over. *State ex rel. Lawson* v. *Warren Brothers Roads Co. et al* (1945) 115 Ind. App. 452, 454, 59 N.E. 219.

Appellant's 6th and 7th Assignments of Error in the Supreme Court of Indiana (Tr., p. 5-6) are quite lengthy and are not set out here for the reason that they appear in Appendix C to Appellant's Statement As To Jurisdiction herein.

These Assignments are likewise improper and presented no question since the error of the trial court, if any was confined to the sustaining of the Demurrer, and because:

(a) These assignments are merely conclusions as to the reasoning of the lower court in sustaining the Demurrer, and because

(b) These Assignments presuppose the existence of a complaint presenting a judicial question to the court on which a decision could be made and the construction and application of a statute had. Such an assumption is entirely inconsistent with the sustaining of a Demurrer for want of facts constituting a cause of action; to-wit, a judicial question.

We also think that Appellant's Assignments of Error No. 1, 2, and 3 in the Supreme Court of the United States are merely repetitious of the 6th and 7th Assignments of Error in the Supreme Court of Indiana, and, for the reasons stated in (b) directly above, present no question to this Court.

Conclusion

The decision of the Supreme Court of Indiana herein, *Columbia Properties, Inc.* v. *State Board of Tax Commissioners et al* (1953) — Ind. —, 111 N.E. (2d) 891 (Appendix A, Appellant's Statement As To Jurisdiction) does not draw into question the validity of a state statute as applied. The opinion decides only that the Appellant has not stated *facts* presenting a judicial question to the court so as to allow it to review the determination of another branch of Government. We well realize that state procedure may not be employed for the purpose of closing the door on federal rights. But we believe that one who has not availed himself of his absolute right to amend or plead over, stating facts presenting a judicial question to the Court, cannot say that he has thereby drawn into question and presented for

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the consideration of the court the validity of a state statute on the ground that it is repugnant to the Constitution, treaties or laws of the United States.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana.
By: ROBERT HOLLOWELL,
Chief Counsel.
GEORGE B. JEFFREY,
Deputy Attorney General.

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INDIANA; CLYDE OVIATT, COUNTY TREASURER OF VANDERBURGH COUNTY, STATE OF INDIANA; CLYDE OVIATT, MEMBER OF THE COUNTY BOARD OF REVIEW OF VANDERBURGH COUNTY, STATE OF INDIANA,

Appellees

MOTION TO DISMISS APPEAL

Comes now the Appellee, State Board of Tax Commissioners of the State of Indiana, by Edwin K. Steers, Attorney General of Indiana, and moves this Court to dismiss the above entitled appeal for the reason that there is not drawn into question herein the validity of a state statute on the ground that it is repugnant to the Constitution, treaties or laws of the United States, and for the further reason that the decision of the Supreme Court of Indiana herein is not in favor of the validity of any state statute so drawn into question, all as appears more fully in Appellees' Statement of Matters Making Against Jurisdiction, which statement is filed herewith.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana.
By: ROBERT HOLLOWELL,
Chief Counsel.
GEORGE B. JEFFREY,
Deputy Attorney General.

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